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IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1971

NO. 70-5426

DOROTHY W. ELLIOTT,

Petitioner,

v.

DOLLAR GENERAL CORPORATION, JOE V. WILLIAMS, JR., individually and as Trustee, and ROBERT SCHOLZE WILLIAMS, individually and as Trustee,

Respondents.

RESPONSE TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF TENNESSEE

BRIEF OF RESPONDENT DOLLAR GENERAL CORPORATION

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8-20-71-48

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RESPONSE OF DOLLAR GENERAL CORPORATION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF TENNESSEE

CORRECTION IN THE STATEMENT OF THE CASE:

In the petition it is correctly stated that the Supreme Court of Tennessee affirmed (unanimously) the dismissal of the plaintiff's case on February 1, 1971, but then the petition incorrectly states: "A timely petition for rehearing was filed on February 22, 1971, * * *." (p. 2)

There was not a timely filing, because Rule 32 of the Supreme Court of Tennessee requires a petition to rehear shall be filed within ten days in order to be considered. The pertinent portion of Rule 32 states:

> "Rule 32. Rehearing. — * * *. But petitions for rehearing must, in all cases, be presented to the Court within ten days after the opinion in the case sought to be re-examined is announced, except decisions made within the last ten days of the term, and, in such cases, the petition must be presented as soon after the decision is made as practicable, and prior to adjournment of the term. * * *." (and no end of term involved here.)

The petition for certiorari was not timely filed in this Court, because 28 U.S.C.A. 2101(c) provides that the petition must be filed within ninety days from the date of the entry of the order and that order would be February 1, 1971, and not April 5, 1971, as petitioner insists. The instant petition was not filed until June 28, 1971, which is not within the ninety-day period after February 1, 1971, but instead is nearly five months later.

REASONS WHY WRIT OF CERTIORARI SHOULD NOT BE GRANTED

We respectfully submit that petitioner for certiorari has not set forth grounds constituting reasons for the issuance of a writ of certiorari (Rule 19).

The facts are simple and undisputed. Petitioner alleges she was injured by falling from the top of a defective toilet seat and lid which broke under her weight. She got up on the toilet seat and lid to reach and pull "on" the light cord hanging from a supposed electric light, said cord being visible in the dark or semi-dark rest room. Petitioner alleges that the building, including the rest room, was

owned by the defendants Williams and rented to defendant Dollar General (A 14-16).

Respondent Dollar General demurred, showing that the petitioner was putting the commode lid to a use for which it was not designed and was guilty of negligence as a matter of law in so doing, petitioner was guilty of negligence as a matter of law in attempting to climb on an old commode seat and lid cover when she could not plainly see, in not seeking the aid of Dollar General personnel, in assuming the risk in climbing upon the commode seat, in failing to show any negligence on Dollar General's part (A 20, 21). Defendants Williams filed a demurrer similar in substance (A 19, 20).

The Trial Court sustained the demurrer (Supp. A 1) and the Supreme Court in an opinion dated February 1, 1971, affirmed the Trial Court (A 2-8). The Supreme Court of Tennessee overruled the petition to rehear (A 12).

I

THE DEMURRER IN TENNESSEE AND KINDRED PRACTICES ELSEWHERE ARE LONG ESTABLISHED LEGAL PRACTICES AND THE PETITIONER HAS HAD HER DAY IN COURT WHEN HER POSITION HAS BEEN FULLY DEVELOPED BEFORE THE TRIAL COURT AND THE SUPREME COURT OF TENNESSEE.

The substantive law of the State of Tennessee governs. *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817.

The general object of a demurrer is to save costs and bring litigation to a speedy close. *Southall v. Billings et al*, 213 Tenn. 280, 375 S.W.2d 844, 847.

There is no right to a jury trial where there is no dispute as to the facts and the only issues are issues of law.

Whirley v. Whiteman, 38 Tenn. 610, 616;
Tyrus v. Railroad, 114 Tenn. 579;
Jackson v. The Texas Co., 10 Tenn. App. 235, 245;
Hill v. Castner-Knott Dry Goods Co., 25 Tenn. App. 232, 166 S.W.2d 638;
L & N v. Cantrell, 25 Tenn. App. 529, 160 S.W.2d 444;
Little v. L & N, 39 Tenn. App. 130, 281 S.W.2d 284;
Monroe Auto Equipment Co. v. Heckethorne Mfg. & Supply Co., (W.D. Tenn. 1963) 214 F. Supp. 704, affirmed 332 F.2d 406, cert. den. 379 U.S. 388, 85 S. Ct. 160;
Mandeville Island Farm, Inc., et al v. American Crystal Sugar Co., 334 U.S. 219, 68 S. Ct. 996;
Bass v. Hoagland, 172 F.2d 205, cert. den. 338 U.S. 716, 70 S. Ct. 57;
Dean v. Southern Railway Co., 327 F.2d 757 (6 C.A.);
50 C.J.S., Juries, §16, p. 730;
41 Am. Jur., Pleadings, §§207, 245, 251;
47 Am. Jur. 2d, Jury, §§14, 15

" * * *. A demurrer at the common law (or a motion to dismiss, the substitute in present Federal court practice for the demurrer) is not a mere procedural nicety. On the contrary it is a precise instrument for final determination on the merits of the justiciability under pertinent rules of law of an asserted cause of action or defense. Sustaining a demurrer puts the party against whose pleading it is directed permanently out of court—unless he is allowed to amend and can amend. Overruling a demurrer sets the machinery of the court in motion and puts the parties to their proof. * * *."

L. B. Wilson, Inc. v. F.C.C., 170 F.2d 793, at 805 (D. of Col. 1947);
71 C.J.S., Pleading, §218, p. 426.

The procedure of demurring is well established in Tennessee, as it was long before Tennessee was created. Provisions for demurring have been carried into the Tennessee Code Annotated and the right is well recognized. T.C.A. §§20-702, 909, 910; Gilreath, *History of a Lawsuit*, 8 Ed. §§193-198, 202, 203, 149. A party may amend his pleading even after a demurrer is sustained if he has anything else to offer the court. T.C.A. 20-914, 915; *Gilreath*, *supra*, §198.

In this particular case there was nothing else that the petitioner could add and so his case was dismissed without ever an attempt made to amend.

It is well established that demurrers should be sustained and the case dismissed where there is no dispute as to the facts and only one inference can be drawn. *McCampbell v. Central of Georgia*, 194 Tenn. 594, 253 S.W.2d 763; *Chattanooga Light & Power Co. v. Hodges*, 109 Tenn. 331; *Jones v. Stewart*, 183 Tenn. 176, 191 S.W.2d 439; *Nichols v. Nashville Housing Authority*, 187 Tenn. 683, 216 S.W.2d 694; and many others.

Similarly, a direction of a verdict, the sustaining of a motion on the pleadings, F.R.C.P. 12(c) and motion for summary judgment, F.R.C.P. 56, all are sustained without depriving a person of the constitutional right to trial by jury for where there is only one reasonable inference there is no issue to be submitted to the jury.

Hopkins v. Railroad, 96 Tenn. 409;
Lasater Lumber Co. et al v. Harding, 28 Tenn. App. 296, 189 S.W.2d 583, 590;
Bass v. Hoagland, 172 F.2d 205, cert. den. 338 U.S. 816, 70 S. Ct. 57;
Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 87 S. Ct. 1072;

King v. United Benefit Fire Ins. Co., 377 F.2d 728 (C.A. Okla. 1967), cert. den. 389 U.S. 857, 88 S. Ct. 99;

McCraw v. Journeymen et al, 341 F.2d 705 (6 Cir. 1965);

47 Am. Jur. 2d., Jury, §14, p. 637;

53 Am. Jur., Trial, §173.

In *Wilson v. Maury County Board of Education*, 42 Tenn. App. 315, 302 S.W.2d 502, the Court said at page 507:

"Plaintiff had no constitutional right to submit statements of facts alleged in her declaration to the jury when such statements were admitted by defendants in a subsequent pleading. Such admitted facts were not 'issues' in the case. Morgan v. Tennessee Central Railway Co., 31 Tenn. App. 409, 216 S.W.2d 32; Finks v. Gillum, 38 Tenn. App. 304, 273 S.W.2d 722; 71 C.J.S. Pleadings, Secs. 517 and 523, pp. 1073 and 1079."

56 C.J.S., Juries, §16, p. 730;

Manaia et al v. Potomac Electric Power Co., 268 F.2d 793, cert. den. 361 U.S. 913, 80 S. Ct. 255.

We submit respectfully that it is not this Honorable Court's function to pass on the question of whether or not the Trial Court and then the Supreme Court of Tennessee acted reasonably in sustaining the demurrers to the declaration. Two Courts have agreed, and it would serve no reasonable nor proper purpose for this Court to undertake such a task, which does not involve anything pertinent to the national interest nor a constitutional question. As Mr. Chief Justice Taft once said: "No litigant is entitled to more than two chances, namely to the original trial and to a review. Where a case goes beyond that it is not primarily to preserve the rights of the litigants."

Demurrers to pleadings should be heard and determined in accordance with the Court rules. *71 C.J.S., Pleadings*, §264, p. 543.

II.

A WOMAN WHO CLIMBS UPON A TOILET SEAT IN A DARKENED REST ROOM IS NOT PUTTING THE TOILET SEAT TO THE USE FOR WHICH IT WAS DESIGNED AND IS GUILTY OF NEGLIGENCE WHICH WOULD BAR ANY RECOVERY, AND THE TENNESSEE SUPREME COURT WAS CORRECT IN SO HOLDING.

It is clear that the purpose of a water closet and/or commode is to receive the waste products from the body. The petitioner alleges:

> " * * * it was necessary for her to use the said rest room"

and

> "plaintiff stepped upon the seat lid of said water closet or commode to reach the light cord," (A 15, 16)

It is obvious that the petitioner was putting the water closet or commode lid and/or seat and/or both to use for which they were not intended. The Tennessee Courts have pointed out that there are many simple objects which are not dangerous if properly used but which can become dangerous if improperly used. In *Highsaw v. Creech*, 17 Tenn. App. 573, 69 S.W.2d 249, the Court said, beginning at page 252:

> " * * *. The fact alone that an injury may be inflicted by such a toy does not make of it a dangerous instrumentality in the sense that the term is generally used. A pocket knife in the hands of an 8 or 9-year-old boy could be so used as to inflict dangerous and serious

> injuries upon another boy, but can it be said that to permit a boy 8 or 9 years of age to have a pocket knife and to carry the knife around with him and to use it, is negligence upon the part of a parent? We think not. *A baseball bat in the hands of an 8-year-old boy could be so used as to inflict serious injury on another small boy, and this is true of other instrumentalities that are generally recognized as harmless and are harmless when properly used.*"

The *Highsaw* case *supra*, is cited with approval in the case of *Cooper v. State*, 201 Tenn. 149, 297 S.W.2d 75, when, speaking of a toy pistol, the Court said on page 77:

> " * * *. It is an entirely harmless article, incapable, within reasonable contemplation, of being 'perverted into a dangerous use by design'."

We respectfully submit that the water closet lid or seat or both were perfectly harmless and petitioner could not possibly have suffered the injury she alleges if she had used the water closet properly and for the purpose designed.

The Tennessee Supreme Court was correct in (1) concluding the petitioner was putting the toilet seat and a lid to a use that the defendants could not foresee, (2) that the toilet seat was designed for the human posterior and not designed to fit the pedal extremities (A 6), or to be used as a stepladder or stool, (3) the petitioner as a matter of law did not exercise ordinary care for her own safety when she stood upon the commode lid to reach the light cord and any resulting injury was due to her own negligence (A 7); and (4) in finding that if there was sufficient light for the plaintiff to see the light cord then there was sufficient light for the plaintiff to use the commode for its intended purpose (A 7).

Dollar General had the right to anticipate that if Mrs. Elliott was going to use the water closet she would do it in the normal or standard way. Dollar General did not have the duty to expect that Mrs. Elliott would climb up on the water closet and to use it as a stepladder or platform. See *Southern Railway Co. v. Whaley*, 170 Tenn. 668, 98 S.W.2d 1061, where it was said, at page 1063:

> "One has a right to assume that a person will exercise ordinary care for his own safety."

and *65 C.J.S., Negligence*, § 15, pp. 592 and 593, where it is said:

> "One is not under the duty of anticipating negligence on the part of others, and cannot ordinarily be charged with negligence for failing to anticipate negligence in, or on behalf of, another, in the absence of knowledge or notice. So, in the absence of anything which gives, or should give, notice to the contrary, a person is entitled to assume, and to act on the assumption, that others will exercise ordinary care; and he does not forfeit his right to act on this assumption because he is not altogether free from negligence. * * *."

Wilson v. Capital Air Lines, 240 F.2d 492 (4 C.A.), involved a somewhat similar situation where the plaintiff fell in a small lavatory on the airplane when she placed her hand on a metal tissue container for support and it gave way, she alleging its giving way caused her to fall. The District Judge directed a verdict for the defendant, affirmed by the United States Court of Appeals, which said in part on page 494:

> " * * *. But if we assume there was no handhold, its absence would not entitle plaintiff to recover in this case. According to her testimony, she did not ask

the steward to help her turn around; she merely asked him to hold one crutch; *and she was injured because she voluntarily rested her weight on a fragile tissue container*, of a type with which she admitted she was familiar, and which she said was on the wall opposite the seat. Defendant was under no duty to dispose handholds around such a cramped space, *nor to anticipate that in the absence of a handhold a passenger would rest her weight on the tissue container, which was obviously not provided for that purpose.*"

Certainly Dollar General was not under any duty of anticipating that Mrs. Elliott would attempt to climb upon the water closet. In fact, Dollar General should have been entitled to assume that she would not do such an act. Also see *Austin v. Smith*, ... Nev. ..., 311 P.2d 971, and *Gardner v. Panama Canal Co.*, 115 F. Supp. 687.

III

A WOMAN WHO CLIMBS UPON A TOILET SEAT IN A DARKENED AREA IS NOT ACTING AS A PERSON OF ORDINARY PRUDENCE WOULD AND IS NOT EXERCISING ORDINARY CARE FOR HER OWN SAFETY, AS REQUIRED BY TENNESSEE LAW.

The declaration shows on its face that Mrs. Elliott's fall came about after she had climbed upon the toilet lid in the darkened rest room. This was her own voluntary act.

First, the law of Tennessee is that it was the duty of Mrs. Elliott to exercise ordinary care to avoid injury and to make reasonable use of her faculties to avoid danger; and if she used an unsafe way when there was a safe way for her to use the rest room, she would be guilty of want of ordinary care. *Manes v. Hines & McNair Hotel*,

184 Tenn. 210, 197 S.W.2d 889, 890; *Memphis Street Railway Co. v. Roe*, 118 Tenn. 601, 102 S.W. 343; *Worsham v. Dempster*, 148 Tenn. 267, 255 S.W. 52.

Secondly, the Tennessee law is that darkness is nature's own warning to arouse the natural instinct of self-protection and is more impressive and convincing than a sign "Danger" nailed on a door, that darkness is a danger that stands gaunt and menacing in front of the plaintiff. *Park v. Sinclair Refining Co.*, 24 Tenn. App. 204, 142 S.W. 2d 321.

Thirdly, the Tennessee law is that there can be no recovery where there is a fall in the dark area where the condition is known and obvious. *Loew's et al Corp. v. Durett*, 18 Tenn. App. 489, 79 S.W.2d 598, where it was said on page 607:

> "'And it has long been the law, based on the ancient maxim, volente non fit injuria, that one who voluntarily places himself in a position of peril, knowing and appreciating the danger, assumes the risk thereof. Broom's Legal Maxims (8th Ed.) p. 267 et seq. * * *'"

Also see *Smith v. Crescent Amusement Co.*, 27 Tenn. 632, 184 S.W.2d 179; *Green v. Crescent Amusement Co.*, 32 Tenn. App. 554, 223 S.W.2d 201; *Park v. Sinclair Refining Co.*, 24 Tenn. App. 204, 142 S.W.2d 321.

In the instant case there could be no question but that Mrs. Elliott was aware of the condition of the darkness and that she was in a better position to see and to appreciate that condition than anyone.

It has long been the law in Tennessee that if the declaration shows negligence on the plaintiff's part which would bar a recovery the demurrer will be sustained and the plaintiff's case dismissed. As in:

Chattanooga Light & Power Co. v. Hodges, 109 Tenn. 331, (1902) (where the building employee, knowing the building was on fire ran back into the building and was fatally burned); *Jones v. Stewart*, 183 Tenn. 176, 191 S.W.2d 439 (1946), (where the declaration showed suicide) following the opinion of the Second Circuit Court of Appeals, *Salsedo v. Palmer*, 278 F. 299; *Nichols v. Nashville Housing Authority*, 187 Tenn. 683, 216 S.W.2d 694 (1949), (where the parents left their 3-year-old daughter playing by a tub filled with very hot water into which the child fell, was burned, and died); *Matthews v. Sou. Coach Lines, Inc.*, 190 Tenn. 282, 229 S.W.2d 340 (1950), (where a bus passenger alighted, walked in front of the bus, was struck by a southbound car); *McCampbell v. Central of Georgia*, 194 Tenn. 594, 253 S.W.2d 763 (1952), (where deceased drove a car into the side of a train and was killed).

An interesting case somewhat similar to the instant one but not nearly as exaggerated, was *Meyere v. Railroad*, 110 Tenn. 166 (1902), where the plaintiff lost his balance and fell from the open train platform, injuring himself. There the Trial Court sustained a demurrer and was affirmed by the Supreme Court, which said on page 173 and 174:

> "We believe the true rule to be that a passenger who voluntarily and unnecessarily undertakes to ride on the platform of a moving train cannot recover damages for injuries sustained in consequence of such perilous exposure. * * *.
>
> " * * *
>
> " * * *. We must conclude, from the facts set out in the declaration, that the injury was brought about by the negligence and imprudence of the plaintiff in assum-

ing voluntarily and unnecessarily a position on the platform of the car admittedly dangerous, and not designed for the use of passengers."

How much stronger is the instant case where Mrs. Elliott voluntarily and unnecessarily sought to climb up on the toilet lid, which was not designed for such a purpose.

IV

THE PETITIONER BECAME A LICENSEE OR TRESPASSER WHEN SHE CLIMBED UPON THE TOILET SEAT AND THE ONLY DUTY OWED HER WAS NOT TO WILFULLY INJURE HER.

Chattanooga Warehouse & Cold Storage Co. v. Anderson, 141 Tenn. 288, is the leading case in Tennessee and held that an invitee could not recover when he went beyond a place where he was invited. The Court said on pages 294, 295 and 296:

"The great weight of authority, however, qualifies this definition of implied invitation by providing that where one goes upon the premises of another, for any of the purposes stated above, he must confine himself to such part of the premises as are included in the invitation. Such implied invitation does not involve in its scope such parts of the establishment to which the public is not invited. It is only those parts of the premises where the person invited is expected to be that the owner is required to keep in a reasonably safe condition.

"As stated by one writer, operators of factories and mills do not impliedly invite customers into parts of their plants where the machinery is being operated, hotel keepers do not invite guests to their engine rooms, and carriers do not invite passengers to the many places not fitted up for their use. (Citing many authorities.)

" * * *

"Conceding that Mr. Anderson was seeking Mr. King on business, and that he transacted business with him before in the office of the storage company, there is nothing in the record to even suggest that he was ever invited into the wareroom, or that it was even suggested by the company that he would come into that private room, a place not open to the public, dark, unlighted, a part of the establishment he had never entered before.

"We are unable to see upon what theory it could be held that the storage company was obligated or owed any duty to Mr. Anderson to keep its wareroom in a safe condition.

"The theory of negligence was well stated by this Court in *Williams v. Nashville*, 106 Tenn. 538, 63 S.W. 233, the Court saying:

" 'For the theory of all negligence cases is that the defendant has violated some legal duty he owed plaintiff. So where such duty does not exist, however unfortunate the injury may be, and free from negligence, yet he must alone bear the consequences; he cannot impose them upon one under no obligation in law towards him, save not to inflict, directly or indirectly, wanton injury upon him.'

"We think that the Court of Civil Appeals was correct in holding that Mr. Anderson entered the wareroom of the storage company without invitation, either express or implied, and that the storage company owed him no duty to keep said place safe."

Accordingly, Dollar General did not invite Mrs. Elliott to climb to the top of the toilet lid, had no reason to antici-

pate that she was there, owed her no duty except to not wilfully or wantonly injure her. In *65 C.J.S., Negligence*, §63, page 757, the author says:

> "An invitation may be limited as to the manner of use. An invitation to come on premises for one purpose does not invite entry for all purposes. The status of an invitee continues only as long as he is using the premises for a purpose reasonably intended by the invitation, and when used for another purpose the invitee loses the status of invitee. *The invitee must use the owner's premises in the usual, ordinary, and customary way.*
>
> "The inviter is under a duty to keep the premises which are within the scope of the invitation safe for all uses by the invitee, *and he is not bound to keep them safe for uses which are outside the scope and purpose of the invitation, for which the property was not designed, and which could not reasonably have been anticipated*, except where he is present and actively cooperates with the invitee in that particular use of the premises."

Certainly the plaintiff was not an invitee when she left the safety of the floor and climbed upon the toilet seat. Certainly Mrs. Elliott was not putting the toilet to the usual, ordinary and customary usage.

Smith v. Burks et al, 43 Tenn. App. 32, 305 S.W.2d 748, held a concrete buyer who voluntarily mounted the left running board of defendant's truck was a mere licensee to whom was owed no greater duty than not to willfully or wantonly injure him. *Campbell v. Hoffman*, 51 Tenn. App. 672, 371 S.W.2d 174 (1963) held that the plaintiff, attempting to get into the dentist's office but who went into another portion of the building and tried to get in through the living quarters before falling, was a licensee

to whom defendant owed no duty except to refrain from wilfully or wantonly injuring her. *Bivin v. Southern Oil Service, Inc.*, 54 Tenn. App. 678, 394 S.W.2d 141 (1965), held a truck driver properly delivering oil became a licensee only when after delivering the oil he climbed to the top of a tank where he had no business and fell. There the failure to replace tank tops which had gradually corroded or rusted, so that they did not comply with the State regulation was simple negligence. The only duty owed was not to wilfully or wantonly injure him and there could be no recovery.

The law of Tennessee is where the visitor's knowledge is equal or superior to that of the owner or occupier of the premises there could be no recovery. *Illinois Central v. Nichols*, 173 Tenn. 602, 118 S.W.2d 213. Certainly that was true in the instant case.

V

SINCE THE PETITIONER COULD SEE A LIGHT-CORD HANGING DOWN THERE WAS SUFFICIENT LIGHT TO USE THE TOILET FOR THE PURPOSES DESIGNED AND THERE WAS NO REASON TO CLIMB UPON THE TOILET LID AS THE TENNESSEE SUPREME COURT HELD.

The Supreme Court said:

> "The declaration alleges that the rest room was dark if the door was closed, but that the plaintiff could see the light cord hanging down. If there was sufficient light for the plaintiff to see the light cord, then there was sufficient light for the plaintiff to use the commode for its intended purpose." (A 7)

This is certainly common sense and it shows that there was absolutely no need for the petitioner, Mrs. Elliott, to

climb upon the toilet lid. In *Zamora v. Shappley*, 27 Tenn. App. 768, 173 S.W.2d 721, the Court made this pertinent comment, applicable here, at page 723:

> "To hold otherwise would be to turn out a conclusion unlighted by common sense and contrary to the realities of every day experience; and that, be it said, is never a sound policy. ***."

VI

THERE IS NO CONSTITUTIONAL QUESTION HERE AND THE ATTEMPT TO RAISE IT WAS FIRST MADE IN THE PETITION TO REHEAR BEFORE THE TENNESSEE SUPREME COURT AND WILL NOT BE NOW CONSIDERED.

Printed in full in a Supplemental Appendix are the assignments of error, brief and argument in behalf of Mrs. Elliott in the Supreme Court of Tennessee, and the Court can see that Mrs. Elliott's attorney does not mention once a violation of the United States Constitution nor the Seventh Amendment nor the Tennessee Constitution (Sup. A 3-13).

Mrs. Elliott has had her day in court. She has been heard fully in the trial Court. She has been heard fully in the Supreme Court of Tennessee, both of which courts have found her declaration insufficient and that she was guilty of negligence as a matter of law. *Olesen v. Muskegon Piston Ring Co.*, 117 F.2d 163 (6 C.A.), treating the question of "his day in court", said at page 165:

> " ***. However, the right to a day in court means not the actual presentation of the case, but the right to be duly cited to appear and to be afforded an opportunity to be heard. Galpin v. Page, 18 Wall., 350,

360, 21 L. Ed. 959. Appellant's contention that no judgment was rendered on the merits also is not tenable. A judgment on the merits does not require a determination of the controversy after a trial or hearing on controverted facts. * * *"

See also *Icaponi v. New Amsterdam Casualty Co.*, 379 F.2d 311 (3 C.A. 1967), cert. den. 389 U.S. 1054, 88 S. Ct. 802.

A "day in court" was raised in *Detti v. General Motors Corp.*, 131 F.2d 379 (3 C.A.), the Court saying on page 382:

"* * * *. Obviously, only one side could prevail in the suit which the plaintiffs brought. A litigant is entitled to the honest, unbiased judgment of the judges of those courts before whom his case comes. He is entitled to a full hearing and to full argument in order that the merits of his side of the controversy may be established. When the litigant has had this, he has had what he is entitled to. Detti and Detti Motors Corporation have had their day in court. They are entitled to and will have nothing more. * * *."

Mrs. Elliott has had the benefit of the honest, unbiased judgment of the Trial Judge and of the Justices of the Supreme Court of Tennessee. She has had a full hearing and full argument twice. This is all she is entitled to. The decision of the Supreme Court of Tennessee was unanimous (A 7).

Only the constitutional issues raised in the lower courts are before the Supreme Court on appeal. *Shelley et al v. Kraemer et al*, 334 U.S. 1 at 8, 9; 68 S. Ct. 836 at 840.

"This assignment was not made a ground in plaintiff's motions for a new trial. By our rules, we are precluded from considering an assignment that was not brought to the attention of the trial judge. Rule 14(5) Supreme Court Rules."

Wilson v. Tranbarger, 218 Tenn, 208, 402 S.W.2d 449 at 456 (1965).

The Tennessee Supreme Court will not consider matters not raised in the Trial Court and thus presented for the first time on appeal to the Supreme Court. *Sullivan et al v. Harpeth Develpt. Corp.*, 218 Tenn. 107, 401 S.W.2d 195 at 197 (1966). Also, *Parker v. Reddick*, 196 Tenn. 472, 268 S.W.2d 357, *Ex Parte Calhoun*, 187 Tenn. 372, 215 S.W.2d 789.

Petitioner did not raise the question of the constitutionality in the Trial Court nor in her appeal to the Supreme Court of Tennessee but first mentioned it in her petition to rehear before the Supreme Court of Tennessee, which petition was filed too late to be considered.

"it is also a principle recognized in many jurisdictions that the constitutionality of a statute cannot be raised for the first time in an appellate court of the State or upon the rehearing in a civil case."

16 Am. Jur. 2d, Constitutional Law, §115.

The cases cited by petitioner are not in point. *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, involved the question of an illegal search and seizure of the most inexcusable type. There was a factual question of whether or not there was ever a search warrant issued in the case and if not, why.

Thomason v. A & P, Inc., 413 F.2d 51 is in no way comparable because there was a question of fact there and that was whether or not A & P properly displayed its merchandise—bunches of grapes which were not bagged nor netted but were accessible in loose bunches and when A & P knew if fingered by the trade could and did fall to the floor., There was a question of fact for the jury as to whether or not A & P was guilty of negligence in not bagging or netting—no question of the Seventh Amendment or the Constitution.

Arkwright Mutual Ins. Co. v. Philadelphia Electric Co., 427 F.2d 1273, involved the substantial question of whether or not a gas supplier of a shopping center caused the fire which destroyed the center. Contrary to what the petitioner's attorney has cited it for, the *Arkwright* opinion went on to say on page 1275:

> "This is not to say that the use of the directed verdict or judgment n.o.v. in favor of the plaintiff is an impossibility in a Federal diversity action. Only last year, this Court held in Gatenby v. Altoona, etc. Corp., 407 F.2d 443, 445 (3 Cir. 1969), that: 'Where the party having the burden of proof produces evidence which establishes the facts in his favor so clearly that reasonable men could have no doubt, he is entitled to a verdict directed in his favor. * * *.'"

Peak v. United States, 353 U.S. 42, 77 S. Ct. 613, has no relevance here as it was a suit on a National Service Life Insurance policy and simply held that where the insured had disappeared suit might not be maintained as a practical matter prior to the expiration of the statutory seven-year period and that accordingly the petitioner's cause of action accrued at the time when she might have successfully maintained her suit, and that the six-year statute of limitations ran from that point.

Much more appropriate are the generally recognized principles that trial by jury is not indispensable to due process of law, that courts have the right to decide questions of law, to direct verdicts, that jury trials are only necessary when there are issues of fact, and those previously decided. *16 C.J.S., Constitutional Law*, §§623, 624; *50 C.J.S., Juries*, §16.

In behalf of Dollar General Corporation it is submitted that the petition for certiorari should be denied.

Respectfully submitted,

PAUL CAMPBELL, JR.
618 James Building
Chattanooga, Tennessee 37402

Attorney for DOLLAR GENERAL CORPORATION

SUPPLEMENTAL APPENDIX

[Fol. 1]

DOROTHY W. ELLIOTT

v.

DOLLAR GENERAL CORPORATION, JOE V. WILLIAMS, JR., individually and as Trustee, and ROBERT SCHOLZE WILLIAMS, individually and as Trustee

NO. 12018-J

IN THE CIRCUIT COURT OF HAMILTON COUNTY, TENNESSEE

ORDER

The above cause having come on to be heard before J. N Hunter, Judge, upon the demurrers submitted by the defendants, and after hearing argument of counsel and taking the matter under consideration the Court being of the opinion that the demurrers are well taken;

It is therefore ordered and adjudged that the demurrers of Dollar General Corporation and of Joe V. Williams, Jr., individually and as Trustee, and Robert Scholze Williams, individually and as Trustee be and the same are hereby sustained. To which action of the Court in sustaining the demurrers the plaintiff excepts and prays an appeal to the next term of the Supreme Court sitting at Knoxville, which appeal is granted. The plaintiff is allowed thirty (30) days in which to file her appeal bond and/or otherwise comply with the law.

This the 19th day of January, 1970.

/s/ J. N. HUNTER
Judge

OK:

/s/ John S. Wrinkle
Attorney for Plaintiff

/s/ Campbell & Campbell
Attorneys for Dollar General Corporation

Bishop, Thomas, Leitner, Mann & Milburn
By: /s/ H. T. Milburn
Attorneys for Joe V. Williams, Jr.,
individually and as Trustee, and
Robert Scholze Williams, individually
and as Trustee

Supplemental Appendix

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

[fol. 1]

DOROTHY W. ELLIOTT
PLAINTIFF IN ERROR

VS.

DOLLAR GENERAL CORPORATION, JOE V. WILLIAMS, JR., Individually and as Trustee, and ROBERT SCHOLZE WILLIAMS, Individually and as Trustee
DEFENDANTS IN ERROR

NO. 64

Hamilton County Law

ASSIGNMENTS OF ERROR, BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR, DOROTHY W. ELLIOTT

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

The defendants in error, Joe V. Williams, Jr., Individually and as Trustee, and Robert Scholze Williams, Individually and as Trustee, for a long time are the owners individually, and as trustees for themselves and others, of a large store building fronting approximately 30 feet at 503 Market Street, extending through one block to Broad Street, in Chattanooga, Tennessee, fronting approximately 30 feet on this latter street, and it is one of the older store buildings in Chattanooga, Tennessee, and they had owned and possessed this store building for many years,

[fol. 2] and on the north side of the store building, about half way from Market Street to Broad Street was

a rest room which was likewise old, containing a water closet, or commode with a seat and lid cover. Said rest room was unlighted, did not have any windows at all. That for at least some weeks prior to April 29, 1969, the said individual defendants, as aforesaid, had leased or rented said store building to the corporate defendant in error, Dollar General Corporation, a corporation organized and existing under the laws of the State of Kentucky, operating a large chain of mercantile stores, and was fully authorized to do business in Tennessee, and said corporate defendant, on April 29, 1969, was operating a retail mercantile business in said store building under the trade name of Valley Salvage Store, selling largely dry goods, notions, pants, and shoes, and said store had many customers entering from both Market and Broad Streets. The Dollar General Corporation also operated a much larger store in the adjoining building at 509 Market Street under the trade name, Dollar General Stores, Inc.

The plaintiff in error, Dorothy Elliott, entered said store from the Market Street entrance on April 29, 1969, as an invitee or customer, seeking to purchase some merchandise for her little daughter. Said Salvage Store had several clerks, agents or servants. Tr. 11 and 12.

[fol. 3] During the course of plaintiff's in error examining said merchandise, it was necessary for her to use the said rest room, and one of the clerks opened the door to said rest room for her to enter, but the said clerk was interrupted by another customer, to do something for her, and said clerk pulled the door to and left the plaintiff in error to make her own entry into the rest room, and as she entered said rest room she discovered that if the door was completely closed that it

would be dark and that there was not any wall light switch, but plaintiff in error could see a cord hanging down from a supposed electric light that was too high for plaintiff in error to reach from the floor, and while exercising due care for her own safety, plaintiff in error lowered the seat lid down on the commode seat, the commode seat being already down, and plaintiff in error stepped upon the said lid of the said water closet or commode to reach the light cord, but the defendants in error, and each of them, had negligently and carelessly permitted said commode seat and said seat lid to become loose, unfastened, dilapidated, or broken and unsuited for either a water closet seat or water closet lid, and said commode seat and lid came apart, falling to the floor causing the plaintiff to fall with her left foot into the commode, and she herself to fall backward onto the floor and against the rest room door and caused plaintiff to be seriously, painfully, and permanently injured.

[fol. 4] That as a direct and proximate result of the carelessness and negligence of the defendants, and each of them, as aforesaid, and said fall, her left ankle was fractured, or broken, the X-Ray showing the head of the 5th metatarsal fractured on the left foot; and loss of normal curvature of lumbar spine, and other serious and permanent injuries. That at the time of the filing of the declaration the plaintiff in error had incurred bills amounting to approximately $3500.00 for hospitalization, doctors, specialists and drugs, and it is likely that she will have to undergo an operation for a serious condition and suffering in her back and spinal column and possibly for a ruptured disc. Tr. 12, 13, and 14.

It is averred that the individual defendants in error were negligent in placing the corporate defendant in pos-

session of said property for the use as a mercantile establishment and inviting to said establishment customers, when the rest room was so defective as to not have a light or light switch, or light cord that could be reached from the floor, and were further negligent in placing the corporate defendant in error in possession of said property without repairing said water closet or commode seat and the lid thereto when they knew, or should have known, that rest room would be used by invitees or customers, and would doubtless be injured as the plaintiff in

[fol. 5] error has been injured, and that said individual defendants in error were, also, negligent in so maintaining said commode and commode seat and the commode lid in such defective condition that plaintiff, who is small in stature and only weighs approximately 110 pounds, would cause it to fall apart, as aforesaid, in attempting to turn on the light, and that the corporate defendant in error was likewise negligent in continuing to use said building as a mercantile store and to maintain said rest room in the condition above described in items 1, 2, 3, and 4, knowing that exercise of ordinary care, or should have known the dangerous condition of said rest room as above described, and was guilty of negligence that was almost gross negligence, and is liable for the said accident, injuries, loss and damages to the plaintiff in error. Tr. 14 and 15.

The plaintiff in error, therefore, sued the defendants in error, and each of them, on July 1, 1969, to recover $50,000.00 damages. Tr. 2 and 15.

The defendants in error, and each of them, demurred to plaintiff's declaration, stating in substance that the plaintiff in error, Dorothy Elliott, had not stated a cause of action against the defendants in error declaration

that she was guilty of negligence as a matter of law in stepping on this defective commode seat and lid to turn on the light and that there was no showing that the defendants were guilty of negligence, and that the plaintiff in error was guilty of negligence as a matter of law and that there could not be any recovery. Tr. 17, 18, 23, and 24.

[fol. 6]

The Trial Court sustained said demurrers, holding in effect that the plaintiff in error was not entitled to a jury trial as to whether she was guilty of negligence, or as to whether she was an invitee in the rest room. The plaintiff in error duly excepted to the ruling of the Trial Judge and prayed and was granted an appeal to this Court. Tr. 25. And this appeal was duly perfected within the time allowed. Tr. 26.

ASSIGNMENT OF ERROR

I.

The Trial Judge erred in sustaining the demurrers of the defendants in error, Dollar General Corporation, Joe V. Williams, Jr., and Robert Scholze Williams, individually and as trustees, and in effect holding that the plaintiff in error had not stated a course of action against the defendants in her declaration, and in holding in effect that the plaintiff in error was not entitled to a jury trial as to whether she was guilty of contributory negligence that would bar a recovery, and in effect holding that she was not an invitee in the rest room, and that she was not entitled to a jury trial as to whether she was an invitee in the rest room or was merely licensee. The Court further erred in effect in holding that the plaintiff in error was negligent in letting down the lid on the commode seat and stepping onto

[fol. 7]

both of them, even though it was the only way that the light cord could be reached in the circumstances. The Trial Judge should have held that the plaintiff in error was an invitee in the store and that she was an invitee in the rest room, that as a matter of fact the clerk in the store opened the door and was helping the plaintiff in error enter the rest room until she was distracted by another customer and left the entry alone to the plaintiff in error without assistance. The Court should have held that the plaintiff in error was entitled to a jury trial on both the issue of negligence and the issue of whether she was an invitee to enter the rest room for the purposes for which the rest room was maintained. Tr. 11-15, 17, 18, 23, 24, and 25.

II.

The Trial Judge erred in sustaining the demurrers of each and all of the defendants in error and in dismissing the suit of the plaintiff in error. The Trial Judge should have held and adjudged that the declaration of the plaintiff in error stated a good cause of action against the defendants in error, and each of them, that it was the duty of the defendants in error and each of them to plead to the declaration, and it would be a question for the jury as to whether the plaintiff in error was an invitee into the store and as to whether she was an invitee into the rest room, and as to whether or not the plaintiff in error was guilty of contributory negligence that contributed to her injuries and damages that would bar her recovery. Tr. 11-15, 17, 18, 23, 24, and 25.

[fol. 8]

Supplemental Appendix

BRIEF AND ARGUMENT

In the Court below the individual defendants have relied upon Campbell vs. Hoffman, 371 S.W.2d 174 where the plaintiff had obtained a judgment because of a fall, but upon appeal Judge Bejach held that she was not an "invitee". She had gone to a dentist's office but found it locked, and she went through another portion of the property seeking to find another entrance to the dental office, and she had on high heels and there was a crack causing a 1/8-inch elevation on which the visitor caught her heel so that she fell and was injured. The facts in the case at Bar are entirely different. The plaintiff being clearly an invitee, and all of the defendants owed her the duty to exercise reasonable care for her protection. The rule here, the individual defendants knowing the condition of the rest room and leasing it to the corporate defendant [fol. 9] for the purpose of using it as a mercantile establishment and having invitees or customers coming into the store and using the rest room, is the same as the opinion of The Court of Appeals in Gentry vs. Taylor, 185 S.W.2d 521 holding both the property owners and the lessee liable, but the ruling of the Court of The Court of Appeals as to the owner but was reversed in an opinion by Mr. Justice Chambliss, holding that there was not any proof that the owner of the property leased has any knowledge of any defect in the seat at the table. Here the demurrer admits the knowledge of all the defendants as to the condition of this property prior to and at the time of the accident.

A good case in point for the plaintiff in error is that of Smith vs. Sloan, 225 S.W.2d 539, the Trial Judge and the jury had found in favor of the plaintiff but the Court of Appeals on appeal reversed the Trial Court but the Supreme

Court granted certiorari and Mr. Justice Gailor wrote the opinion of the Court and held that there was abundance of evidence to support findings for plaintiff. In head note 8, the rule is well stated.

> "Whether any kind of behavior conforms to legal standard of reasonable conduct, fixed by courts or statutes as that of reasonable man, in absence of more exact rule, is mere fact question for jury, not question of law, though jury must reason and judge facts in reaching conclusion."

On petition to rehear in this cause Smith vs.
[fol. 10] Sloan, 227 S.W.2d 2 Judge Gailor again held that the facts were for the jury.

Another case supporting the principles of law insisted upon by the plaintiff in error here is that of Crescent Amusement Co. vs. Byrne, 3 Tenn. App. 425 was an action by an infant plaintiff to recover for injuries sustained by falling from the gallery of the picture show where the evidence showed that the window was closed by shutters, but that the shutters were rotten and the locks had been destroyed so that the same could be opened by the slightest pressure, and it was held that the theater was negligent in allowing an opening to remain in this condition and the plaintiff could recover. This case supports the contentions of Dorothy Elliott here that the defendants had permitted said commode seat and said lid to become loose, unfastened, dilapidated or broken and unsuited for either a water closet seat or water closet lid and that this condition caused her fall.

In the theater case of Kingsul Theatres vs. Quillen, 196 S.W.2d 316 it was held that the question as to whether theater patron was guilty of contributory negligence be-

cause she momentarily looked back while leaving theater, though she knew of existence of step on which she fell, was for the jury, where patron had not been to the theater for three or four years and she looked back only while taking one step forward.

[fol. 11] In the restaurant case of Campbell vs. Weathers, 111 Pacific 2d 72 (Kansas), head note 7 reads:

> "In invitee's action against restaurateur for injuries sustained in stepping into open trap door in hallway leading to toilet provided for use of guests, whether invitee stepping over small pasteboard box in dimly lighted hallway was contributorily negligent was question of fact for jury."

This action was against the owner, the manager, and the lessee. The Trial Judge sustained the demurrer to the evidence of all three defendants, but the Supreme Court of Kansas reversed the Trial Court as to the liability of the lessee but affirmed as to the owner and manager. The distinction between this Kansas case and the case at Bar is that the individual defendants well knew there was no light switch; that the cord was short, and that the commode seat and the commode lid were loose, or broken, and would fall apart as they did with this 110 pound plaintiff that was short of stature.

In Gow vs. Multnomah Hotel, 224 Pacific 2d 552 (Oregon 1950), the action of the plaintiff was against the Multnomah Hotel, Inc., a corporation, and another, and was for injuries sustained when a counter stool on which plaintiff was sitting broke, casting him to the floor. The verdict of the jury was against both defendants and judgment was entered for the defendants, notwithstanding the verdict for the plaintiff, and the plaintiff appealed.

[fol. 12] Supplemental Appendix

The Supreme Court in its opinion said:

"The issue of negligence was properly submitted to the jury. Since the jury considered all of the evidence and then returned their verdict for the plaintiff, we hold that the court erred in granting judgment non obstante for the defendant. The judgment for the defendant is set aside and the cause is remanded with the directions to enter a judgment for the plaintiff upon the verdict."

In the Hotel Case of Lonnecker vs. Borris, 329 S.W.(2), 524, the Supreme Court of Missouri, quoting from 28 Am. Jur., Section 56, page 578, said:

"The law imposes a duty on an Inn Keeper, or a similar proprietor to furnish safe premises to his patrons and to provide articles of furniture which may be used by them in the ordinary and reasonable way without danger."

Doubtless, the members of this Court know from experience that an ordinary commode seat and lid is strong and safe.

In my own bathroom the medicine cabinet with florescent lights is turned on and off by a small switch at the side of the cabinet; but the overhead light is controlled by a light switch at the entrance to the bathroom, and it has overhead a large light bulb, and this is shaded by a glass light shade in the form of a bowl upside down, screwed into the ceiling. This light bulb is almost directly over the commode; and it burns out about every twelve or eighteen months and it is necessary to unscrew the screws holding up the light shade so as to get in and remove the light bulb and place a new one in its place. I weigh 185
[fol. 13] pounds and instead of going to the basement to get a step ladder, I let down the commode seat

and the commode lid and step upon it and unscrew the light shade with a screw driver. I know of my own knowledge that it has never broken or even cracked.

Unquestionably the Trial Judge should have submitted this question to a jury that could and would draw upon the knowledge and experience and understanding of each juror as to who was negligent.

Had there been a light switch in the rest room this accident would not have happened. Had there been an ordinary commode seat and commode lid instead of a loose, broken, and dilapidated commode seat and commode lid, the accident would not have happened, and Dorothy Elliott, small in stature and weighing only 110 pounds, would not owe approximately $3500.00 for doctors, medicines and hospital bills, plus being on crutches and having to undergo a serious operation.

WHEREFORE, the plaintiff in error, Dorothy Elliott, most respectfully insists and urges that it is the duty of this Honorable Court to reverse the Trial Judge and remand this cause to the Trial Court for trial before a jury upon the merits of this case.

[fol. 14]

Respectfully submitted,

/s/ John S. Wrinkle
Attorney for Plaintiff
920 Hamilton National Bank Building
Chattanooga, Tennessee

[Certificate of Service Omitted]

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

[fol. 1]

DOROTHY W. ELLIOTT
Plaintiff-Appellant

-vs-

DOLLAR GENERAL CORPORATION ET AL
Defendant-Appellee

NO. 64

Hamilton County Law

BRIEF IN SUPPORT OF MOTION TO STRIKE

(Filed March 1, 1971)

The opinion in the above-styled case was filed on February 1, 1971. The PETITION TO REHEAR was filed or mailed on February 21, 1971. Rule 32 of the Supreme Court requires that petitions for rehearing must be presented to the Court within ten days after the opinion is announced.

Further, the mere filing of the petition to rehear in the Clerk's Office, without motion, is ineffectual. *Adams v. Sharon*, *89 Tenn.* 335.

The PETITION TO REHEAR should be dismissed.

Respectfully submitted,

/s/ Paul Campbell, Jr.
Attorneys for Dollar General Corporation
CAMPBELL & CAMPBELL
618 James Building
Chattanooga, Tennessee 37402

[Certificate of Service Omitted]

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

[fol. 1]

DOROTHY W. ELLIOTT
Plaintiff-Appellant

VS.

DOLLAR GENERAL CORPORATION, JOE V. WILLIAMS, JR., individually and as Trustee, and ROBERT SCHOLZE WILLIAMS, individually and as Trustee,
Defendants-Appellees

NO. 64

Hamilton County Law

MOTION TO DISMISS PETITION TO REHEAR

(Filed March 4, 1971)

Appellees, Joe V. Williams, Jr., individually and as Trustee, and Robert Scholze Williams, individually and as Trustee, and move this Honorable Court for an order dismissing the petitioner's petition to rehear on the following grounds:

(1) The petition to rehear was not presented to this Honorable Court within ten (10) days after the opinion sought to be re-examined was announced as required by Rule 32 of the Rules of Supreme Court;

(2) The petition to rehear presents no matters or argument not previously considered by the petitioner's counsel in brief and orally, before this Court's decision in this matter and, thus, also fails to comply with Rule 32 of the Rules of Supreme Court.

[fol. 2]

Supplemental Appendix

Respectfully submitted,

BISHOP, THOMAS, LEITNER, MANN & MILBURN

By: /s/ Brian C. Smith
Attorneys for Appellees Joe V. Williams, Jr., individually and as Trustee, and Robert Scholze Williams, individually and as Trustee

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

[fol. 1]

DOROTHY W. ELLIOTT
Plaintiff-Appellant

-vs-

DOLLAR GENERAL CORPORATION ET AL
Defendant-Appellee

NO. 64

Hamilton County Law

MOTION TO STRIKE PETITION TO REHEAR

(Filed March 1, 1971)

Now comes the Dollar General Corporation, by its attorneys, and moves the Court to strike the PETITION TO REHEAR filed by the attorney for plaintiff-appellant, because the PETITION TO REHEAR was not filed within ten days after the opinion in the case was announced and filed. Supreme Court Rule 32.

/s/ Paul Campbell, Jr.
Attorneys for Dollar General Corporation
CAMPBELL & CAMPBELL
618 James Building
Chattanooga, Tennessee 37402

[Certificate of Service Omitted]